IN THE

Supreme Court of the United States

October Term, 1939.

No. 638.

APEX HOSIERY COMPANY, a Pennsylvania Corporation,
Petitioner,

v.

WILLIAM LEADER and AMERICAN FEDERATION OF FULL FASHIONED HOSIERY WORKERS, PHILADELPHIA, BRANCH NO. 1, LOCAL NO. 706,
Respondents.

Petitioner's Brief in Reply to Briefs of Respondents and Amici Curiae.

SYLVAN H. HIRSCH,
ALLEN J. LEVIN,
ARNO P. MOWITZ,
STANLEY FOLZ,
Bankers Securities Building,
Philadelphia, Pa.,
Attorneys for Petitioner.

SUNDHEIM, FOLZ & HIRSCH,
Philadelphia, Pa.,
Of Counsel.

INDEX.

Page

I. Congress Never Intended to Exclude All Labor Union Activities From the Scope of the Sherman Act 1

A. Intention of Congress in Passing the Sherman Act 1

B. Intention of Congress in Passing the Clayton Act 6

C. Intention of Congress in Subsequent Legislation Relied on as Exempting All Labor Union Activities From the Scope of the Sherman Act 8

II. Activities of Labor Unions Are Not Excluded From the Operation of the Sherman Act by Technical Use of the Expression "Restraint of Trade" 10

III. Appendix:

Excerpts From Brief of the United States in the Hutcheson Case 16

CASES CITED.

	Page
Aldridge v. Williams, 44 U. S. 3, How. 9-24, 11 L. ed. 469 (1845)	4, 5
American Net & Twine Co. v. Worthington, 141 U. S. 468, 35 L. ed. 821 (1891)	4
In re Debs, 158 U. S. 564, 39 L. ed. 1092 (1895)	3
Callan v. Wilson, 127 U. S. 540, 32 L. ed. 223 (1888)	12
Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088 (1901)	4
District of Columbia v. Washington Market Co., 108 U. S. 243, 27 L. ed. 714 (1883)	4
Dunlap v. United States, 173 U. S. 65, 43 L. ed. 616 (1899)	4
Duplex Printing Press Co. v. Deering, 254 U. S. 443, 65 L. ed. 349 (1921)	4
Frankfurter and Greene, "The Labor Injunction," at pp. 142, 145	7
In re Grand Jury, 62 Fed. 834 (1894)	2
Lapina v. Williams, 232 U. S. 78, 58 L. ed. 515 (1914)	4
Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488 (1908)	3
Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597 (1900)	4
Mitchell v. Great Works Milling & Mfg. Co., 2 Story 648, 653	5
Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 57 L. ed. 1501 (1913)	4
Reg. v. Hertford College, L. R. 3 Q. B. Div. 693, 707	5
Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619 (1911)	4
State v. Stewart, 59 Vt. 273, 9 Atl. 559 (1887)	12
Thomas v. Cincinnati Railway, 62 Fed. 803 (1894)	2
United States v. Borden Company, 308 U. S. , 84 L. ed. 143	8

CASES CITED—Continued.

	Page
U. S. v. Cassidy et al., 67 Fed. 698 (1895)	2
U. S. v. Agler, 62 Fed. 824 (1894)	2
U. S. v. Debs, 63 Fed. 436 (1894)	2
U. S. v. Debs, 64 Fed. 724 (1894)	2
U. S. v. Elliott, 62 Fed. 801 (1894)	2
U. S. v. Elliott, 64 Fed. 27 (1894)	2
United States v. St. Paul, M. & M. R. Co., 247 U. S. 310, L.ed. 1130 (1918)	4
United States v. Trans-Missouri Freight Asso., 166 U. S. 290, 41 L. ed. 1007 (1897)	4
United States v. Union P. R. Co., 91 U. S. 72, 23 L. ed. 224 (1875)	4, 5
U. S. v. Workingmen's Amalgamated Council et al., 54 Fed. 994; aff'd. 57 Fed. 85 (1893)	2
Waterhouse v. Comer, 55 Fed. 149 (1893)	2

IN THE

Supreme Court of the United States.

No. 638. October Term, 1939.

APEX HOSIERY COMPANY, a PENNSYLVANIA CORPORATION,

Petitioner,

v.

WILLIAM LEADER AND AMERICAN FEDERATION OF FULL FASHIONED HOSIERY WORKERS, PHILADELPHIA BRANCH NO. 1, LOCAL NO. 706,

Respondents.

PETITIONER'S BRIEF IN REPLY TO BRIEFS OF RESPONDENTS AND AMICI CURIÆ.

The interval of time between the receipt of briefs from respondents and the *amici curiæ* and the date of the argument is so short that this brief can merely outline the reply to the most important of the issues raised in those briefs.

I. Congress Never Intended to Exclude All Labor Union Activities From the Scope of the Sherman Act.

A. INTENTION OF CONGRESS IN PASSING THE SHERMAN ACT.

The respondents and at least two of the *amici curiæ* contend that in the enactment of the Sherman Act Congress did not intend that any activities of labor unions should come within its scope and that this Court should now

so hold. No such contention was made by respondents in the courts below. To this contention there are a number of answers:

1. An examination of the legislative history of the Act not only fails to reveal that it was the intention of Congress to exclude all activities of labor unions from the operation of the Sherman Act, but leads inescapably to the conclusion that Congress *did* intend that the Sherman Act should apply to *unlawful* activities of labor unions by which commerce was restrained. A thorough analysis of this legislative history has been made in a brief recently filed by Mr. Thurman Arnold, Assistant Attorney General, and special assistants to the Attorney General in U. S. v. HUTCHESON ET AL., in the District Court of the United States for the Eastern District of Missouri, Eastern Division, September Term, 1939, No. 21231. Pertinent sections of that brief upon this legislative history are printed in full in the Appendix to this reply brief.

2. Immediately following the passage of the Sherman Act, there was a host of lower court cases in which the Act was turned against labor and its activities.[1] As a result of the Pullman Strike of 1894, the use of injunctions under the Sherman Act against labor in various cases received widespread publicity. One of these cases reached this

[1] U. S. v. WORKINGMEN'S AMALGAMATED COUNCIL, 54 Fed. 994, *aff'd.*, 57 Fed. 85 (1893); WATERHOUSE v. COMER, 55 Fed. 149 (1893); U. S. v. ELLIOTT, 62 Fed. 801 (1894); U. S. v. ELLIOTT, 64 Fed. 27 (1894); U. S. v. AGLER, 62 Fed. 824 (1894); U. S. v. DEBS, 64 Fed. 724 (1894); THOMAS v. CINCINNATI RAILWAY, 62 Fed. 803 (1894); IN RE CHARGE TO GRAND JURY, 62 Fed. 828 (1894); U. S. v. DEBS, 63 Fed. 436 (1894); IN RE GRAND JURY, 62 Fed. 834 (1894); U. S. v. CASSIDY, 67 Fed. 698 (1895).

Court. In re Debs, 158 U. S. 564, 39 L. ed. 1092 (1895). If in 1890 Congress had really intended to exclude labor unions from the operation of the Act, and immediately thereafter it saw the Act misapplied in the cases above cited, Congress would have been spurred into action. It certainly had ample opportunity to correct this so-called "misapplication" of the Act, when between 1890 and 1902 eleven bills were introduced into Congress which provided, among other things, for the exemption of labor from the provisions of the Sherman Act.[2] The sole purpose of one of these bills was to amend the Act so as to exempt labor organizations. This bill died in Committee.[3] The very failure of the above mentioned bills to become law is clear indication of Congressional intent *not to exclude labor unions* from the operation of the Sherman Act.

3. This Court, without a dissent, has consistently held that it was the intention of Congress to include restraints of trade caused by the unlawful activities of labor unions within the scope of the Sherman Act. Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488 (1908). Despite repeated attempts to persuade this Court to reverse itself upon this point it has adhered to the rule of Loewe v. Lawlor without deviation. See cases cited on page 14 of petitioner's original brief.

---

[2] H. R., 6640, in the 52nd Congress; H. R., 10539, in the 55th Congress; H. R., 11667 in the 56th Congress; S., 649 and H. R., 14947, in the 57th Congress; S., 1728, H. R., 89, H. R. 116, and H. R. 2636, in the 52nd Congress; H. R., 7938 in the 55th Congress; and H. R., 11988 in the 57th Congress.

[3] S., 1546, *Bills and Debates Relating to Trusts*. Senate Document No. 147, 57th Congress, 2nd Session 1902-1903, page 557. Copies of the bills here mentioned in the order of their introduction may be found in *Bills and Debates Relating to Trusts*, Senate Document No. 147, 57th Congress, 2nd Session, 1902-1903, pp. 465 and 411, 469 and 449, 473 and 431, 477 and 417, 481, 581, 949, 953, 987 and 999.

4. The contention that Congress did not intend to include labor unions within the operation of the Sherman Act at the time of its passage is based principally upon legislative debates preceding the passage of the Act. Such reliance totally disregards the repeated decisions of this Court that legislative debates may *not* be resorted to as a means of determining congressional intent, even if the language of the statute in question be ambiguous. ALDRIDGE v. WILLIAMS, 3 How. 9, 11 L. ed. 469 (1845); UNITED STATES v. UNION P. R. Co., 91 U. S. 72, 23 L. ed. 224 (1875); DISTRICT OF COLUMBIA v. WASHINGTON MARKET Co., 108 U. S. 243, 27 L. ed. 714 (1883); AMERICAN NET & TWINE Co. v. WORTHINGTON, 141 U. S. 468, 35 L. ed. 821 (1891); UNITED STATES v. TRANS-MISSOURI FREIGHT ASSO., 166 U. S. 290, 41 L. ed. 1007 (1897); DUNLAP v. UNITED STATES, 173 U. S. 65, 43 L. ed. 616 (1899); MAXWELL v. DOW, 176 U. S. 581, 44 L. ed. 597 (1900); DOWNES v. BIDWELL, 182 U. S. 244, 45 L. ed. 1088 (1901); STANDARD OIL Co. v. UNITED STATES, 221 U. S. 1, 55 L. ed. 619 (1911); OMAHA & C. B. STREET R. Co. v. INTERSTATE COMMERCE COMMISSION, 230 U. S. 324, 57 L. ed. 1501 (1913); LAPINA v. WILLIAMS, 232 U. S. 78, 58 L. ed. 515 (1914); UNITED STATES v. ST. PAUL, M. & M. R. Co., 247 U. S. 310, 62 L. ed. 1130 (1918); DUPLEX PRINTING PRESS Co. v. DEERING, 254 U. S. 443, 65 L. ed. 349 (1921).

The reasons for this rule were clearly pointed out in the case of UNITED STATES v. TRANS-MISSOURI FREIGHT ASSN., 166 U. S. 290, 41 L. ed. 1007 (1897), wherein this Court, at page 318, stated:

> "Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would be impossible to say what were the views of a majority of the members of each House in relation to the meaning of the act. It cannot be said

that a majority of both Houses did not agree with Senator Hoar in his views as to the construction to be given to the act as it passed the Senate. *All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this act as we determine the meaning of other acts from the language used therein.*

There is, too, a general acquiescence in the doctrine that *debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body.* UNITED STATES v. UNION P. R. Co., 91 U. S. 72, 79; ALDRIDGE v. WILLIAMS, 44 U. S. 3, How. 9-24, Taney, Ch. J.; MITCHELL v. GREAT WORKS MILLING & MFG. Co., 2 Story, 648, 653; REG. v. HERTFORD COLLEGE, L. R. 3 Q. B. Div. 693, 707.

The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed." (Italics ours.) [1]

---

[1] The complete misconception of the law on this question under which respondents and the *amici* labor will be realized by examination of the brief on behalf of the National Lawyers Guild, at page 23, wherein it is stated:

> "It is a well-settled canon of interpretation that legislative debates are not controlling in the interpretation of statutes but may be resorted to in case of doubt. Bearing that in mind, it is permissible to resort to the intention of Congress with respect to the Act generally, in order to ascertain whether Congress intended to enact the common law into a federal statute or to enact something different from the common law."

5. The actual intent of Congress in enacting the Sherman Act, with respect to its applicability to the activities of labor unions, has become a completely academic question. After this Court had held in LOEWE v. LAWLOR, *supra*, that labor unions engaging in conspiracies in restraint of trade were within the prohibition of that law, Congress in 1914, in the enactment of the Clayton Act, approved and accepted this construction of the Sherman Act by granting immunity from the Sherman Act only to certain peaceful and lawful activities of labor unions. We refer to Sections 6 and 20 of the Clayton Act, which are cited and quoted in full at pp. ' and 10 of petitioner's main brief. Whatever may have bee intent of Congress in passing the Sherman Act, it is clear that in passing the amendatory Clayton Act, Congress intended that the Sherman Act should continue to apply to labor unions when they engaged in those activities in restraint of trade, to which immunity from the Sherman Act was not extended by the Clayton Act.

B. INTENT OF CONGRESS IN PASSING THE CLAYTON ACT.

The respondents and the *amici curiæ* argue at length that the Clayton Act afforded a blanket exemption of all labor union activities from the operation of the Sherman Act. As pointed out above, the language of Sections 6 and 20 of the Clayton Act (printed at length on pp. 9 and 10 of petitioner's main brief) demonstrates the exact contrary.

This attempt to distort what is clearly a limited exemption of certain specific lawful labor activities into a complete exemption of all labor activities, by reference to the congressional debates and the legislative history of the Clayton Act has likewise been fully treated in the brief filed

by Assistant Attorney General Arnold, from which appo-site sections are printed in the appendix to this reply brief. (On this point see pp. 32 *et seq., infra.*)

The conclusions to be drawn from the congressional debates on the Clayton Act and its legislative history are succinctly stated in FRANKFURTER AND GREENE, "THE LABOR INJUNCTION," at pp. 142, 145:

> "This measure brought labor, so it was thought, into the promised land. 'Those words, the labor of a human being is not a commodity or article of commerce', Samuel Gompers informed the trade union movement, 'are sledge hammer blows to the wrongs and injustices so long inflicted upon the workers. This declaration is the industrial magna charta upon which the working people will rear their construction of industrial freedom.' And descending to particulars, Mr. Gompers added, 'This declaration removes all possibility of interpreting trust legislation to apply to organizations of the workers, and their legitimate associated activities.' Whether this expectation coincided with Congressional intent is meat for endless dialectic. The debates in Congress looked both ways.
>
> . . . . . .
>
> "This brief history illustrates how fictitious can become the search by courts for 'the intent of legislature' in construing ambiguous enactments. With a legislative history like that which surrounds the Clayton Act, talk about the legislative intent as a means of construing legislation is simply repeating an empty formula. . . . The long-drawn-out battle on the national stage, to withdraw labor tactics from the risks of judicial notions concerning 'restraint of trade', was fought and lost."

The unequivocal language of the Clayton Act granting o labor unions only a limited exemption from the operation f the Sherman Act is not susceptible of the interpretation

sought to be placed upon it by respondent and *amici curiæ*, by resort to the equivocal evidence of congressional intent.

C. Intention of Congress in Subsequent Legislation Relied On as Exempting All Labor Union Activities From the Scope of the Sherman Act.

The respondents and the *amici curiæ* argue that even if the unlawful activities of labor unions, by which commerce is restrained, were within the scope of the Sherman Act and were not excluded therefrom by the Clayton Act, nevertheless Congress by subsequent legislation has granted complete exemption of all labor union activities from the scope of the Sherman Act. The Statutes thus relied on are: Norris-LaGuardia Act, Railway Labor Act, National Labor Relations Act, Public Contracts Act, Fair Labor Standards Act and the Anti-Racketeering Act.

If Congress had intended by any or all of these Acts to exempt the activities of labor unions from the operation of the Sherman Act, even when resort was had to violence and lawlessness, Congress could and would have said so in unmistakable terms. Congress certainly did not intend to repeal the Sherman Act by implication.

This contention has been so recently rejected by this Court that extended discussion is unnecessary. On December 4, 1939, in the case of United States v. Borden Company, 308 U. S. 188, 84 L. ed. 143, Mr. Chief Justice Hughes, speaking for a unanimous court, reversed the decision of the lower court which held that subsequent legislation had rendered inapplicable the prohibitions of the Sherman Act to a conspiracy participated in by milk distributors, a cooperative association of milk producers, and

a labor union engaged in distributing milk and others, stating (84 L. ed. at 149):

"It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. United States v. Tynen, 11 Wall. 88, 92, 20 L. ed. 153, 154; Henderson's Tobacco, 11 Wall. 652, 657, 20 L. ed. 235, 237; General Motors Acceptance Corp. v. United States, 286 U. S. 49, 61, 62, 76 L. ed. 971, 977, 978, 52 S. Ct. 468, 82 A. L. R. 600. The intention of the legislature to repeal 'must be clear and manifest.' Red Rock v. Henry, 106 U. S. 596, 601, 602, 27 L. ed. 251, 253, 1 S. Ct. 434. It is not sufficient, as was said by Mr. Justice Story in Wood v. United States, 16 Pet. 342, 362, 363, 10 L. ed. 987, 995, 'to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary'. There must be a 'positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only pro tanto to the extent of the repugnancy.' See also Posadas v. National City Bank, 296 U. S. 497, 504, 80 L. ed. 351, 355, 56 S. Ct. 349.

"The Sherman Act is a broad enactment prohibiting unreasonable restraints upon interstate commerce, and monopolization or attempts to monopolize, with penal sanctions. The Agricultural Act is a limited statute with specific reference to particular transactions which may be regulated by official action in a prescribed manner.

. . . . . .

"These explicit provisions requiring official participation and authorizations show beyond question how far Congress intended that the Agricultural Act should

operate to render the Sherman Act inapplicable. *If Congress had desired to grant any further immunity, Congress doubtless would have said so.*" (Italics ours.)

II. The Expression in the Sherman Act "Conspiracies in Restraint of Trade", Is Not a Word of Art Which Excludes the Activities of Labor Unions From Its Prohibitions.

It is argued by respondents that at common law, labor unions were not considered illegal conspiracies in restraint of trade and that when Congress, in the Sherman Act, used the words "conspiracy in restraint of trade", it used words of art which showed an intention to exclude labor unions from the operation of the Act—that at common law the expression "conspiracy in restraint of trade" was never applied to labor unions. (This argument is now made by respondents for the first time in the long history of this case.)

In making this contention, respondents completely disregard a host of English and American authorities, which, prior to the Sherman Act, held that where laborers combined and interfered with the business operations of the employer, they were guilty of conspiracy in restraint of trade. The common law concept of conspiracy in restraint of trade comprehended the activities of labor.

Dr. Alpheus T. Mason, in his book "Organized Labor and the Law"[1], conclusively demonstrates that because the expression "conspiracy in restraint of trade" had been applied at common law to the activities of labor unions, Congress, when it used that expression in the Sherman Act

[1] Duke University Press, 1925.

necessarily meant to include the activities of labor within the scope of the Act. His thesis is amply documented with English and American cases [2] and commentators.[3] Says Mason (page 21):

> "The first and most important doctrine which the English courts invoked against labor was the doctrine of criminal conspiracy. Later, the courts found another check, not entirely distinct from the doctrine of conspiracy, that could be imposed on the operations of labor combinations. *This was the common-law rule holding as unlawful all contracts or combinations in restraint of trade.* In England, these two doctrines profoundly affected the activities of organized labor." (Italics ours.)

Again, at page 139, Mason says:

> "The term restraint of trade, however, covered agreements other than those just referred to. That term, as Sir William Erle says, 'is of very wide extension' and embraces not only agreements among producers and manufacturers to control the market and set the price of products, *but also the activities of labor combinations,* such as boycotting, strikes, and picketing. It should be observed, however, that even here if the purposes of the labor union are successfully prosecuted, the effect is to remove, temporarily at least, the offensive employer from the field of competition, and thus one may say that competition is in a measure suppressed. Even so, agreements among laborers to strike, picket or boycott were rarely referred to at common law as restraining competition. *Rather they were objected to as in restraint of trade, and were held to be actionable or indictable as such.*" (Italics ours.)

---

[2] See cases, Footnote 8, page 136 of MASON.

[3] See MASON, pages 44 *et seq.*, and footnotes. For a complete development of this subject see MASON chaps. I to III inclusive.

Three years before the passage of the Sherman Act, in the case of STATE v. STEWART, 59 Vt. 273, 9 Atl. 559 (1887) (not cited by the respondents) the Court held that the activities of a labor union constituted a conspiracy to restrain trade.

In the STEWART Case, the respondents were charged under the common law with the offense of conspiracy by violence and intimidation to prevent a granite company from employing certain granite cutters, to deter certain laborers from working for the company and to compel the granite works to conform to the rules of the National Stonecutters Union. Said the Court at page 284:

> "The respondents' counsel argue that the first and second counts do not cover the offense of criminal conspiracy at common law. But we think, upon a careful examination of the English and American cases cited in argument,—and we suspect that none have been overlooked on either side,—*that it is clear to a demonstration that a combination of the character set forth in these counts was a conspiracy at the common law;* and further, that the subject-matter of the offense being the same in this country as in England, namely, an interference with the property rights of third persons, and a *restraint* upon the lawful prosecution of their industries, as well as an unlawful control over the free use and employment by workmen of their own personal skill and labor, at such times, for such prices, and for such persons as they please, the common law of England is 'applicable to our local situation and circumstances' in this behalf, and therefore the common law of Vermont." (Italics ours.)

See also CALLAN v. WILSON, 127 U. S. 540, 32 L. ed. 223 (1888).

Here then, is a clear statement of the common law of both England and the United States immediately prior to the passage of the Sherman Act.

Wherefore, it is respectfully submitted that neither the common law nor the Congressional debates or legislative history indicate that Congress intended to exclude the unlawful activities of labor unions from the Sherman Act.

Respectfully submitted,

SYLVAN H. HIRSCH,
ALLEN J. LEVIN,
ARNO P. MOWITZ,
STANLEY FOLZ,
Bankers Securities Building,
Philadelphia, Pa.,
Attorneys for Petitioner.

SUNDHEIM, FOLZ & HIRSCH,
Of Philadelphia, Pa.,
Of Counsel.

APPENDIX.

The following pages contain a portion of the Brief for the United States filed in UNITED STATES v. HUTCHESON in The District Court of the United States for the Eastern District of Missouri, Eastern Division, September Term, 1939, No. 21231 by Mr. Thurman Arnold, Assistant Attorney General, whose exhaustive researches on the quoted subjects are set forth in his text, and whose conclusions, stated with clarity and precision, render any attempt to restate them a work of supererogation.

BRIEF OF UNITED STATES IN HUTCHESON CASE.

(*Pages 58 to 97 inclusive.*)

III.

The Acts of Defendants Are Not Privileged or Otherwise Exempted From the Application of Section 1 of the Sherman Act by Any Provision of Either the Sherman Act or the Clayton Act.

The proposition stated in the point heading just above has again and again been affirmatively decided by the Supreme Court. See *Loewe* v. *Lawlor*, 208 U. S. 274; *Lawlor* v. *Loewe*, 235 U. S. 522; *Duplex Co.* v. *Deering*, 254 U. S. 443; *United States* v. *Brims*, 272 U. S. 549; *Bedford Cut Stone Co.* v. *Stone Cutters' Assn.*, 274 U. S. 37; *Local 167* v. *United States*, 291 U. S. 293. The defendants apparently recognize that these are *ad hoc* decisions adverse to their position. Their only recourse is to ask this Court to overrule this long line of cases, and to refuse to abide by the rules there laid down by the Supreme Court. Without stopping to question the propriety of a lower court overruling decisions of the Supreme Court of the United States

(cf. *United States ex rel. Perkins* v. *Guest*, 17 F. Supp. 177, at 180) we pass to a consideration of this question on the merits. We shall here review the background against which the Sherman Act was drawn, the legislative history of the Sherman Act, its interpretation by the Supreme Court in *Loewe* v. *Lawlor, supra*, the legislative history of the Clayton Act, and its interpretation by the Supreme Court in *Duplex Co.* v. *Deering, supra, Bedford Cut Stone Co.* v. *Stone Cutters' Assn., supra, Local 167* v. *United States, supra.*

Legislative History of the Sherman Act. The defendants' entire argument in support of their asserted exemption relies upon certain conclusions drawn from the legislative history of the antitrust laws. That legislative history does not support the broad exemption claimed, despite the argument contained in the article "The Sherman Act And Labor Disputes" by Louis G. Boudin in 39 Columbia Law Review 1283 and 40 Columbia Law Review 14. In form a law review article, Mr. Boudin's article is actually merely another brief on behalf of claimed labor exemption under the Sherman Act submitted by the man who has appeared as counsel for labor leaders in *Leader* v. *Apex Hosiery Co., supra*, and *International Brotherhood of Teamsters, etc.* v. *International Union of Brewery, etc., Workers, supra*, and other recent cases. We think that Mr. Boudin's argument is largely academic and answers itself. A detailed refutation of that argument is beyond the scope of this brief, since it would extend its length to truly unwieldy proportions upon questions which are purely collateral to those in issue here. However, it is to be noted in reading Mr. Boudin's article that at every step in his argument the premises upon which he builds are founded upon inferences drawn from

conflicting facts, inferences which are not only not inescapable ones, but which often seem to be most implausible. For the Court's information we desire to point out that this same question of the applicability of the Sherman Act to labor organization is also treated in Mr. Jaffe's article, *supra*, and in a Note (1940) 49 Yale Law Journal 518. Without referring again to these articles we shall here sketch briefly the legislative history of the Sherman Act.

The Sherman Act must be read against the background of the 19th century labor law. The antitrust law was designed primarily to strike at the evils brought about by combinations of business organizations, that is, trusts and monopolies. Since that proposition is undisputed there is no need to review here the familiar story of the growth of monopolies in the late 19th century. Instead, we turn directly to the consideration of the labor problems confronting the country at the time of the passage of the Sherman Act.

The period from 1860 to 1890 witnessed the birth and growth of national labor organizations and a consequent increase in activities directed toward the betterment of labor conditions. The period from 1873 to 1880 was one of general depression and unemployment and was marked by a large number of strikes, many of which were accompanied by violence and crime. By 1880, the Knights of Labor, the first national labor union, had achieved widespread prominence while engendering coincident distrust and disfavor because of its secret character. This organization was split broadly into two factions, one favoring reform through political channels and the other advocating direct action. The latter group proved the stronger and in the early eighties embarked the organization upon a series of strikes in an aggressive campaign to raise the standard of living.

However, the frequency of the strikes and the violent measures which were usually adopted soon alienated public sympathy, and by 1887 the Knights were in wide public disfavor. In the meantime the American Federation of Labor had been formed and was fast growing, but as a result of the ill-advised activities of the Knights of Labor, the Federation was, until 1898 at least, regarded by the public with some suspicion.

Nor were the courts idle during this period. The doctrine of criminal conspiracy had long been applied to combinations of laborers and several successful prosecutions took place under this doctrine as late as the decade of the eighties. The law reports of that period contain a number of examples of prosecutions or injunctions against labor organizations as "conspiracies" on the ground that they restricted the play of free enterprise. See, for example, *Callan* v. *Wilson*, 127 U. S. 540; *State* v. *Stewart*, 59 Vt. 273, 9 Atl. 559. As the use of the criminal weapon declined the resort to the injunctive remedy grew apace. The injunction was first utilized against labor organizations during the great railway strike of 1877 and between that date and 1890 it was resorted to upon numerous occasions in both state and federal courts. See Landis, *Cases On Labor Law*, Introduction, p. 34 *et seq.*

Against this background on August 14, 1888, Senator Sherman introduced S. 3445, a bill "to declare unlawful trusts and combinations in restraint of trade and production." The first section of this bill read, in part, as follows:

> That all arrangements, contracts, agreements, trusts or combinations • • • made with a view or which tend to prevent full and free competition • • • are hereby declared to be against public policy, unlawful and void;

In discussion of this section of the bill in the Committee of the Whole, Senator George declared that it would be applicable to labor organizations. No vote on this bill was ever had in the Senate.

On December 4, 1889, Senator George introduced a bill (S. 6) in relation to trusts, section 4 of which contained a provision exempting the activities of labor organizations made with a view to lessening hours or increasing wages. During the Fifty-first Congress (1890) a number of bills relating to trusts containing identical provisions were introduced but were never acted upon. H.R. 91, H.R. 402, H.R. 509, H.R. 826, H.R. 3819, H.R. 3844.

On December 4, 1889, Senator Sherman introduced S. 1, "A bill to declare unlawful trusts and combinations in restraint of trade and production." The bill was referred to the Finance Committee. On January 14, 1890, the bill was reported out from the Finance Committee to the Committee of the Whole. As introduced by Senator Sherman and reported from the Finance Committee, section 1 of the bill read in part as follows:

> That all arrangements, contracts, agreements, trusts or combinations * * * made with a view, or which tend, to prevent full and free competition * * * and * * * designed, or which tend, to advance the cost to the consumer * * * are hereby declared to be against public policy, unlawful and void;

The bill contained no provision exempting labor organizations from its terms and provisions.

There followed several extended discussions with reference to the application of the bill to labor organizations. Senators Hiscock, George, Teller, Stewart, and Hoar, were of the opinion that the bill would interfere with the organizations of laborers and farmers.

Senator Sherman spoke against this view but was unable to convince several of the Senators that the bill would not be applicable to labor organizations. For example, on March 25, 1890, Senator Stewart said:

> Again, suppose that the employers, railroad companies, and manufacturing establishments should say that labor shall be put down to two bits a day. Suppose that capital should combine against labor, as it is very much inclined to do, and there should be a combination among the laborers which would increase the cost of production and increase the cost of all articles consumed. Suppose there should be a combination among the laborers to protect themselves from grasping monopolies; they would all be criminals for doing it. (See Bills and Debates in Congress, pp. 192-194.)

Consequently, Senator Sherman introduced a proviso to Section 1 of the bill. The proviso was taken from an amendment proposed by Senator George and read as follows:

> *Provided*, That this act shall not be construed to apply to any arrangements, agreements, or combinations between laborers made with the view of lessening the number of hours of labor or of increasing their wages; nor to any arrangements, agreements, or combinations among persons engaged in horticulture or agriculture made with the view of enhancing the price of agricultural or horticultural products.

In offering this proviso Senator Sherman said: "I do not think it necessary, but, at the same time to avoid any confusion, I submit it to come in at the end of the first section." The proviso was adopted as an amendment.

On March 27, 1890, Senator Edmunds spoke in vigorous opposition to the proviso which had been appended to section 1 of the bill. Senator Edmunds' view was that it

was economically impractical to permit combinations on one economic plane while prohibiting them on another. (Bills and Debates in Congress, p. 289 *et seq.*).

Senator Hoar expressed an opposing view to which Senator Edmunds joined vigorous debate. Senator Edmunds spoke, in part, as follows:

> The laborer can not earn wages by looking at the sky, as beautiful as it is; he can not earn wages by looking at the sea, as deep as it is. He must earn wages by finding somebody who can afford—unless he breaks and they both go to the bottom—to pay him the price he demands for his day's work. That somebody is a corporation, as the Senator says, as one illustration. That corporation is only an association of persons. There is no corporation in the world and never can be, for business purposes at any rate, that is not simply a form of association of human beings just like the association of the laborers.
>
> He deals, therefore, on the other side with a human being, and he wishes to earn the highest wage he can. If he gets that wage paid to him, the thing that he has done must be worth the money that is paid to him for doing it or his employer will fail, and then he will have nothing to do and the whole business will stop. That sort of thing has happened a thousand times, and it is happening every day in every State of the Union where an enterprise in which five men, ten men, one hundred men, a thousand men and women are engaged in helping carry on by the work of their hands, for wages, goes down into the bottomless pit of bankruptcy because the amount of wages paid and the other expenses of the establishment do not bring out money enough to carry it on on that scale. There is no getting away from that, and therefore if the wage-earner is to command the operation of the statute and the wage-payer can not go to the community and to his

brother manufacturers in the same town and say, "Let us agree to put up the wages of our laborers in all our establishments, as they wish a dollar a day more, and let us put the price on our commodity that goes out a dollar a ton more, or whatever it may be, to make that good so that we can all live and get on," the two sides of the equation are not on an equal footing.

On the one side you say that is a crime and on the other side you say it is a valuable and proper undertaking. That will not do, Mr. President. You can not get on in that way. It is impossible to separate them; and the principle of it, therefore, is that if one side, no matter which it is, is authorized to combine the other side must be authorized to combine, or the thing will break and there will be universal bankruptcy. That is what it will come to, and then the laborer, whose interest and welfare we are all so really desirous to promote, will turn around and justly say to the Senate of the United States, "Why did you go to such legislation as that? Why did you attempt to stimulate and almost require us to combine against our employers, and thus break down the whole industry of the country and leave us all beggars? When you allowed us to combine and to regulate our wages, why did you not allow the products that our hands produced to be raised in price by an arrangement, so that everybody that bought them might pay the increased price, and everybody that was making them all around for whom we were working could live also?" I do not think, as a practical thing, Mr. President, that anybody will thank us for making a distinction of that kind.

After this debate and on the same day, March 27, 1890, the bill, including the proviso which had been attached to Section 1 by amendment, was referred to the Committee on the Judiciary. On April 2, 1890, the bill as amended by the Committee on the Judiciary was reported back, Section 1 reading as follows:

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The labor proviso, it will be noted, had been stricken by the Committee. No report of the proceedings of the Committee can be found, nor was there any further debate on the bill with reference to the labor question. The substitute bill was agreed to in the Committee of the Whole and was reported to the Senate. On April 8, the bill was passed by the Senate. The title was amended so as to read: "A bill to protect trade and commerce against unlawful restraints and monopolies."

On June 20, 1890, the bill was passed by the House in the same form as it had passed the Senate. During the debate in the House, there was no illuminating discussion with reference to the applicability of the bill to labor organizations. The Act became effective on July 2, 1890. 26 Stat. 209.

A complete presentation of the case favoring the applicability of the Sherman Act to labor organizations is most forcefully presented by Professor Mason in his book "Organized Labor and the Law" (1925). Professor Mason bases his argument both on the legislative history of the Act and upon the common law background heretofore set forth. His argument proceeds somewhat as follows:

(1) As introduced the bill rendered illegal "combinations and arrangements" which prevented "full and free competition." Despite Senator Sherman's assertion to the contrary, Senators George and Teller insisted that the bill would be applicable to labor organizations.

(2) Senator Sherman proposed a proviso which would exclude labor organizations from the provisions of the bill. This proviso was adopted by the Senate in the Committe of the Whole.

(3) The proviso was then vigorously attacked by Senator Edmunds who insisted that the bill should be framed in such a manner as would be applicable to labor organizations as well as to other types of combinations and organizations.

(4) The bill was then sent to the Judiciary Committee, of which Senator Edmunds was Chairman. Senators Hoar and George were also members of this Committee.

(5) The bill was next reported from the Judiciary Committee. No committee report was available. The proviso exempting labor organizations had been deleted and the bill now declared the following to be illegal: "Every contract or combination in the form of rust or otherwise, or conspiracy, in restraint of trade or commerce." The bill passed Congress in this form.

Professor Mason concludes his argument as follows:

It is, indeed, a noteworthy fact that this section, unlike the corresponding provision introduced by Senator Sherman, is not confined to a denial of "all arrangements, contracts, agreements," etc., made with the purpose of preventing "full and free competition" —that is, all arrangements in form of trusts. It goes much further and denounces every contract and combination in restraint of trade, whether in "the form of

trusts or otherwise." Nor is this all. The bill was extended at the same time to "conspiracies in restraint of trade."

Clearly these modifications carry no small significance regarding the intention of those responsible therefor. The elimination of the proviso exempting labor from the operation of the bill; the addition of the term "conspiracy"; and above all the substitution of the phrase "restraint of trade" for "full and free competition"; all this, together with the avowed attitude of Senator Edmunds toward exemptions, would seem to indicate an intention on the part of the judiciary committee to deal with the evils growing out of combinations more broadly than was originally contemplated. (p. 127).

Supreme Court interpretation of the Sherman Act. *Loewe* v. *Lawlor*, 208 U. S. 274, decided by the unanimous preme Court in 1908 (a bench that included Mr. Justice lmes in its membership) the Supreme Court first passed on the question of the applicability of the Sherman Act labor organizations and decided that that Act did apply. ere the complaint averred that the defendants, members a labor union, combined among themselves and with the F. of L. to apply and did apply a boycott against plain-'s products and others who handled plaintiff's prod-ts in some 20 states, in an effort to compel the ionization of plaintiff's factory. In holding that this ne within the prohibition of the Sherman Act, the unani-ous Court speaking through Chief Justice Fuller, said:

> The averments here are that there was an existing interstate traffic between plaintiffs and citizens of other States, and that for the direct purpose of destroying such interstate traffic defendants combined not merely to prevent plaintiffs from manufacturing articles then

and there intended for transportation beyond the State, but also to prevent the vendees from reselling the hats which they had imported from Connecticut, or from further negotiating with plaintiffs for the purchase and intertransportation of such hats from Connecticut to the various places of destination. So that, although some of the means whereby the interstate traffic was to be destroyed were acts within a State, and some of them were in themselves as a part of their obvious purpose and effect beyond the scope of Federal authority, still, as we have seen, the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out. If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced and at the other end after the physical transportation ended was immaterial.

Nor can the act in question be held inapplicable because defendants were not themselves engaged in interstate commerce. The act made no distinction between classes. It provided that "every" contract, combination or conspiracy in restraint of trade was illegal. The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before use.

In an early case, *United States* v. *Workingmen's Amalgamated Council*, 54 Fed. Rep. 994, the United States filed a bill under the Sherman act in the Circuit Court for the Eastern District of Louisiana, averring the existence of a "gigantic and widespread combination of the members of a multitude of separate organizations for the purpose of restraining the commerce among the several States and with foreign countries,"

and it was contended that the statute did not refer to combinations of laborers. But the court, granting the injunction, said:

"I think the Congressional debates show that the statute had its origin in the evils of massed capital; but, when the Congress came to formulating the prohibition, which is the yardstick for measuring the complainant's right to the injunction, it expressed it in these words: 'Every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal.' The subject had so broadened in the minds of the legislators that the source of the evil was not regarded as material, and the evil in its entirety is dealt with. They made the interdiction include combinations of labor, as well as of capital; in fact, all combinations in restraint of commerce, without reference to the character of the persons who entered into them. It is true this statute has not been much expounded by judges, but, as it seems to me, its meaning, as far as relates to the sort of combinations to which it is to apply, is manifest, and that it includes combinations which are composed of laborers acting in the interest of laborers.

* * * * * * *

The case was affirmed on appeal by the Circuit Court of Appeals for the Fifth Circuit. 57 Fed. Rep. 85.

Subsequently came the litigation over the Pullman strike and the decisions, *In re Debs*, 64 Fed. Rep. 724, 745, 755; *S. C.*, 158 U. S. 564. The bill in that case was filed by the United States against the officers of the American Railway Union, which alleged that a labor dispute existed between the Pullman Palace Car Company and its employes; that thereafter the four officers of the railway union combined together and with others to compel an adjustment of such dispute by creating a

boycott against the cars of the car company; that to make such boycott effective they had already prevented certain of the railroads running out of Chicago from operating their trains; that they asserted that they could and would tie up, paralyze and break down any and every railroad which did not accede to their demands, and that the purpose and intention of the combination was "to secure unto themselves the entire control of the interstate, industrial and commercial business in which the population of the city of Chicago and of other communities along the lines of road of said railways are engaged with each other, and to restrain any and all other persons from any independent control or management of such interstate, industrial or commercial enterprises, save according to the will and with the consent of the defendants."

The Circuit Court proceeded principally upon the Sherman Anti-Trust law, and granted an injunction. In this court the case was rested upon the broader ground that the Federal Government had full power over interstate commerce and over the transmission of the mails, and in the exercise of those powers could remove everything put upon highways, natural or artificial, to obstruct the passage of interstate commerce or the carrying of the mails. But in reference to the Anti-Trust Act the court expressly stated (158 U. S. 600):

"We enter into no examination of the act of July 2, 1890, c. 647, 26 Stat. 209, upon which the Circuit Court relied mainly to sustain its jurisdiction. It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the act, but simply that we prefer to rest our judgment on the broader ground which has been discussed in this opinion, believing it of importance that the principles underlying it should be fully stated and affirmed."

And in the opinion, Mr. Justice Brewer, among other things, said (p. 581):

"It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State, with its recognized powers of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?" (208 U. S. pp. 300-302, 302-304)

The principles set forth in this case were reaffirmed by the opinion of Mr. Justice Holmes in the later case of *Lawlor* v. *Loewe*, 235 U. S. 522, in upholding an award of damages granted after trial.

Certain conclusions can be drawn with reference to the intent of the Sherman Act, despite its fragmentary history. The cardinal principle of statutory construction is that first resort must be had to the language used, and that other sources of enlightenment may only be looked to if such language is ambiguous. The language of the Sherman Act, whether given its literal meaning or that which would be derived from its common law setting, is clear. All conspiracies in restraint of trade, which at common law would have included restraints by labor (*Callan* v. *Wilson, supra*), are declared to be illegal.

Furthermore, when the Sherman Act was under consideration by the Senate a proviso was added to Section 1 specifically providing an exemption for labor organizations. 21 Cong. Rec. 2611, 2654-2655. The bill as amended was

referred to the Committee on Judiciary and when it was reported out from that Committee the proviso had been stricken. 27 Cong. Rec. 2901. In view of the debate which had taken place with respect to the question of the application of the Act to labor, the only fair inference which may be drawn from the action of the Senate in striking out the proviso and enacting the bill without it is that there was no intention to confer a general exemption upon labor organizations. In other words, proceedings in the Senate join with the usual presumption that the language used in the Sherman Act should be given its normal and literal meaning. As we have seen, that was the decision of the Supreme Court in *Loewe* v. *Lawlor, supra*. Mr. Justice Frankfurter, writing in conjunction with Greene in the volume "The Labor Injunction" (1930), expresses his view of the applicability of the Sherman Act in the following language:

> Passed primarily as a safeguard against the social and economic consequences of massed capital, the Sherman Law provided broadly that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." Now a "conspiracy" had at this time been defined by the Supreme Court substantially in the language of Lord Denman [1] "* * * a combination of two or more persons by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means [2] * * *. The first interpretation of the Sherman Law came from the lower courts. In 1893 one of the district courts held that "they (Congress) made the interdiction include combinations of labor, as

[1] See **Jones** Case, 4 B. & Ad. 345, 349 (1832).

[2] **Pettibone v. United States**, 148 U. S. 197, 203 (1892); **Duplex Co. v. Deering**, 254 U. S. 443, 465 (1921).

well as of capital." Succeeding decisions with but a single exception accumulated to the same effect. This view ultimately received the Supreme Court's sanction. The most definite exposition of the Sherman Law was made in the *Gompers* case [221 U. S. 418]: "It (the Sherman Law) covered any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital, or * * * of labor; and we think also whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words or printed matter." (pp. 8-9)

Mr. Justice Frankfurter (*ibid*, p. 8, footnote 36) points out that it was the purposeful intention of Congress to pass to the courts "the burden of clarifying language purposely left obscure." In support of this statement the remarks of Senator Edmunds of the Judiciary Committee are cited and also comments of Senator Hoar taken from his autobiography.

As might be expected, the decisions in *Loewe* v. *Lawlor*, *supra*, and *Lawlor* v. *Loewe*, *supra*, drew sharp rebuke from organized labor.

A campaign was immediately instituted to bring about the passage of legislation which would withdraw labor unions from the scope of the federal antitrust laws, and several attempts were made in Congress to achieve this end, without success. S. 4233, H.R. 8917, 56th Cong., 1st Sess.; H.R. 89; H.R. 1234; H.R. 4063, 58th Cong., 1st Sess.; H.R. 6782; H.R. 8136, 58th Cong., 2d Sess.; H.R. 4445, 59th Cong., 1st Sess.; H. R. 17137, 60th Cong., 1st Sess., H.R. 3058, 61st Cong., 1st Sess. Such attempts had been begun shortly after the lower court decisions which had declared labor groups to be within the purview of the

Sherman Act. Frankfurter and Greene, *op. cit. supra*, pp. 139-141.

In 1911, in *Standard Oil Company* v. *United States*, 221 U.S. 1, it was held that illegal combinations could be dissolved under the provisions of the Sherman Act. This, coming after the *Loewe* case, caused union leaders to become apprehensive that unions might be dissolved under the law. Consequently the efforts on the part of labor organizations to obtain a legal status were greatly intensified.

Promises were made to labor during the presidential campaign of 1912. The Democratic national platform committed itself to the exemption of labor and farm organizations from the provisions of the Sherman law. Frankfurter and Greene, *op. cit. supra*, p. 141. As a result of these campaign promises, renewed efforts were instituted in behalf of labor organizations.

It is clear that labor in general contemplated complete exemption of its organizations from the Sherman law. The primary threat, however, in the light of the *Standard Oil* case, was the possibility that under the Sherman Act, all associations and combinations of workers might be subject to dissolution regardless of the extent of their activities.

Legislative History of the Clayton Act. On the failure of the numerous bills referred to above there was a widespread feeling in the campaign of 1912 that something should be done to improve the condition of labor, and at least to remove from it the threat of dissolution of labor unions under the Sherman Act.

In 1912, after an extensive hearing, the House Judiciary Committee reported out a bill for the "regulation of injunctions" (H.R. 23635, 62nd Cong., 2d Sess.); see H.R.

Rept. No. 612, 62d Cong., 2d Sess.; 48 Cong. Rec. 6458 (1912). This bill was designed in part to add to Section 266 of the Judicial Code paragraphs governing the issuance of injunctions in labor disputes. Section 266 c which ultimately became, with slight modification, Section 20 of the Clayton Act read as follows:

> That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.
>
> And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at or near a house or place where any person resides or works, or carries on business, or happens to be for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute; or from recommending, advising, or persuading others by peaceful means so to do; or from paying or giving to or withholding from any person engaged in such dispute any strike benefits or other moneys or things of value; or from peaceably

assembling at any place in a lawful manner and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto.

This bill did not purport to modify the Sherman Act in any way. The committee report (H.R. Rept. 612, 62d Cong., 2d Sess., p. 37) states that—

> The bill does not interfere with the Sherman Anti-trust Act at all; it leaves the law of conspiracy untouched * * *

With respect to the second paragraph of Section 266 c the report stated (*id.*, at p. 30):

> The second paragraph of section 266c is concerned with specific acts which the best opinion of the courts holds to be within the right of parties involved upon one side or the other of a trades dispute. The necessity for legislation concerning them arises out of the divergent views which the courts have expressed on the subject and the difference between courts in the application of recognized rules. * * *

The report then proceeded to review judicial decisions and secondary authorities indicating the "best opinion of the courts" with respect to the legality of different types of labor activity. With respect to the strike, the report stated that the bill forbade the courts only to interfere with the right of workmen to lawfully combine and to adopt methods which are lawful (*id.*, p. 32). With respect to a boycott the report quoted with approval from several authorities indicating that the "primary" boycott, but not the secondary boycott, was legal (*id.*, pp. 33-35).

This bill was characterized by John W. Davis, then a Congressman from West Virginia, who supported it, as an "effort to crystallize into law the best opinions of the

courts" (48 Cong. Rec. 6438). The bill passed the House as reported (48 Cong. Rec. 6470-71), and was submitted to the Senate Judiciary Committee but not reported out during that session of Congress.

On April 14, 1914, Representative Clayton introduced into the Sixty-third Congress H.R. 15657, entitled "A Bill to Supplement Existing Laws Against Unlawful Restraints and Monopolies and for Other Purposes". The bill was referred to the Judiciary Committee and reported from that committee on May 6, 1914 (H.R. Rept. 627, 63d Cong., 2d Sess.). The bill, which subsequently became the Clayton Act, contained a number of important amendments to the antitrust laws. Sections 15 to 18 of the bill were substantially the same as the bill to regulate injunctions passed by the House in 1912, Section 18 being identical with Section 266 c of the prior bill. With respect to these sections the House committee report adopted and incorporated in full the report on the 1912 Act already described.

Section 7 of the bill as reported also related to labor. This section provided that—

> Sec. 7. That nothing contained in the antitrust laws shall be construed to forbid the existence and operation of fraternal, labor, consumers, agricultural, or horticultural organizations, orders, or associations instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations, orders, or associations from carrying out the legitimate objects thereof.

The committee report stated that—

> The objection of section 7 is to make clear certain questions about which doubt has arisen as to whether or not fraternal, labor, consumers, agricultural, or

horticultural organizations, orders, or associations organized for mutual help, not having capital stock or conducted for profit, come within the scope and purview of the Sherman antitrust law in such way as to warrant the courts under interpretations heretofore given to that law to enter a decree for the dissolution of such organizations, orders, or associations upon a proper showing, as may be done in regard to industrial corporations and combinations which have been found to be guilty of violation of its provisions.

The report quoted at length from the testimony of Mr. Gompers at the hearing before the Judiciary Committee. The remarks quoted (H.R. 612, 62nd Cong., 2nd sess.) showed that Mr. Gompers was concerned with the possibility that labor organizations might be dissolved under the antitrust laws as recently interpreted. The committee report then concludes:

> In the light of previous decisions of the courts and in view of a possible interpretation of the law which would empower the courts to order the dissolution of such organizations and associations, your committee feels that all doubt should be removed as to the legality of the existence and operations of these organizations and associations, and that the law should not be construed in such a way as to authorize their dissolution by the courts under the antitrust laws or to forbid the individual members of such associations from carrying out the legitimate and lawful objects of their associations. This will be accomplished by the provisions of section 7 of this bill, * * *. It also guarantees to individual members of such organizations, orders, or associations, the right to pursue without molestation or legal restraint the legitimate objects of such association. * * *

Section 18 of the bill was amended at the suggestion of the committee so as to add to it the phrase "nor shall any of the acts specified in this paragraph be considered or held unlawful" (51 Cong. Rec. 9652). The purpose of this amendment was to conform the law on the law side of the court to the law prescribed in paragraph 18 for the equity side.

Representatives Nelson and Volstead and Representative Morgan submitted minority reports in which they declared that section 7 as framed was vague and indefinite and that by its provisions no concession was extended to labor organizations.

Representative Floyd, a member of the Committee on the Judiciary, was the first to undertake an analysis of the bill on the floor of the House. Representative Floyd's construction of Section 7 was that it was not intended to exempt labor organizations from the provisions of the Sherman Act but rather that it was intended to assure labor against prosecution for combination and association, *per se*. Speaking a few days later Representative Madden expressed the same opinion. Representatives Nelson, Sherwood, Kelly, and MacDonald were of the same view and criticized the bill for that reason.

In consequence of the debate which had arisen with reference to the meaning of Section 7, Representative Webb on June 1, 1914, proposed the following amendment to that section:

> Nor shall such organizations, orders, or associations, or members thereof, be held or construed to be illegal combinations in restraint of trade under the antitrust laws.

Representative Henry declared that this proposal was made at the request of himself and a number of other rep-

resentatves, that its adoption would clearly exempt labor organizations from the provisions of the antitrust laws, and that it was acceptable to counsel for the labor organizations. On the other hand Representative Madden declared that the addition was "superfluous and merely senseless repetition in its purport of what precedes". Representative Webb seemed to be in accord with this view despite the previous declaration of Representative Henry. He said, in answer to a question from Representative Murdock:

> Now, I will say frankly to my friend that we never intended to make any organizations, regardless of what they might do, exempt in every respect from the law. I would not vote for any amendment that does do that.

The majority of the House seemed to be of the opinion that this amendment would add little, if anything, to the meaning of Section 7 as it had been reported from the Judiciary Committee.

Representative Thomas, who had stated that the amendment "means nothing" and was "a mere declaration of that which is now the law," then proposed a "clear-cut" exemption providing that

> The provisions of the antitrust laws shall not apply to agricultural, labor, consumers, fraternal, or horticultural organizations, orders or associations.

A vote was taken and this amendment was rejected. The Webb amendment was then voted upon and adopted.

The question of whether the secondary boycott was to be legalized was considered in the debates on Section 18 of the bill. To the suggestion that Section 18 would legalize the secondary boycott, Representative Webb declared:

> I will say frankly to my friend when this section was drawn it was drawn with the careful purpose not

to legalize the secondary boycott, and we do not think it does. There may be a difference of opinion about it, but it is the opinion of the committee that it does not legalize the secondary boycott and is not intended to do so.

On June 5, 1914, the bill was reported to the House by Committee of the Whole and was immediately passed. June 6 the bill was reported to the Senate and referred the Committee on the Judiciary. On June 22 the bill was orted out by Senator Culberson (Sen. Rept. No. 698, 63d ng., 2d Sess.). At the beginning of the report it was ted generally that—

> * * * the general scope of the House measure is unchanged. It is not proposed by the bill or amendments to alter, amend, or change in any respect the original Sherman Antitrust Act of July 2, 1890. The purpose is only to supplement that act and the other antitrust acts referred to in section 1 of the bill.
>
> * * * * * * *
>
> The other important and general purposes of the bill are to exempt labor, agricultural, horticultural, and other organizations from the operation of the antitrust acts; to regulate the issuance of temporary restraining orders and injunctions generally by the Federal courts, and particularly in labor controversies, and to make provision for the trial by jury of contempts committed without the presence of the court.

e report then quoted in full and with apparent approval House committee report, including the 1912 report inrporated therein, *supra*.

The report then states that "the general scope of the ouse bill is followed in the Senate amendments", and oceeds to take up the individual sections (p. 42). With spect to Section 7, the Senate inserted the word "law-

fully" before the phrase "carrying out the legitimate objects thereof" (p. 59), and struck out "fraternal" and "consumers" organizations from the exemption, stating that

> * * * But the principal consideration which moved the Committee to strike out "consumers", which also applies in a less degree to "fraternal" organizations, is that they believe the only organizations which should be excluded from the operation of the antitrust laws are those where labor is the basis or one of the chief factors in the organizations, as in the case of labor organizations proper, and in agricultural and horticultural organizations. The Committee rest this distinction upon the broad ground that labor is not, and ought not to be regarded as, a commodity; within the purview of antitrust laws.

Section 18 was amended by inserting the word "lawful" in the clause relating to the withholding of patronage, and by substituting in the last clause the phrase "to be violations of the antitrust laws" in place of the word "unlawful".*

On August 5, 1914, the Senate, acting in Committee of the Whole, undertook consideration of the bill. The debates and discussions reveal a considerable amount of confusion in the minds of the Senators regarding the purpose of the Clayton Act. Much of this confusion is readily explained when we bear in mind that the discussion was held immediately preceding a crucial mid-term election in November, 1914. It is a fair inference that much of the discussion favorable to the side of labor, particularly the general reference to the Clayton Act as a "new charter of

*This clause, as amended, read "nor shall any of the acts specified in this paragraph be considered or held to be violations of the antitrust laws."

reedom for labor," was directed in part, at least, to ob-
ining the labor vote rather than to the clarification of the
layton Act. The best lawyers among the Senators, how-
er, were in no doubt as to the limited scope of the amend-
ents provided by the Clayton Act. Thus Senator Borah
oke as follows:

> I think no one should be misled and I feel that it is entirely proper to make known what we do not do as well as what we propose to do. The only effect of it, in my judgment, will be to remove the possibility of an attack upon the organization as such, which in my judgment at this time could not be successfully made. In other words, it removes a fear, possibly well grounded, but in my judgment unfounded in the law as it now exists. This section gives these organizations a status and permits them to lawfully carry out their legitimate purposes.
>
> Doubtless the impression prevails among workingmen of the country that, according to the decisions of the court, labor organizations of themselves, organized for the purpose of protecting their wage, when guilty of any overt act in raising the wage are within the prohibition of the Sehrman law. If such were the law, no one would want it so; but that such is not the law I entertain no doubt. The only effect of this section, therefore, standing alone and as reported from the committee, is to set at rest the fear that these organizations *per se* may be attacked and dissolved under the Sherman law.

nator Thomas spoke to the same effect, as follows:

> • • • But, Mr. President, after listening to the arguments on this floor upon the meaning and effect of this section, it has occurred to me that its recitals are not commonly understood, and that too great latitude has been given to its provisions. Notably, on

yesterday the declaration was made on at least two occasions to the effect that if section 7 was enacted into law it would wholly exempt labor and agricultural organizations from the operation of the antitrust act.

Mr. President, whatever else we may do we can not afford to enact legislation that is going to prove a disappointment in its practical operation, and this will prove to be a disappointment if statements of that sort are allowed to go unchallenged, because I do not believe that this section does or that it should wholly exempt any class of citizens completely and permanently from the operation of the general statutes of the country. Such legislation is dangerous in the extreme, and the more dangerous in that it is bound to become a precedent upon which other classes and other interests will found their subsequent contentions for similar legislation to the ultimate undoing of free institutions, for I think it may be stated as a general proposition that no legislation, unless it becomes absolutely unavoidable should be enacted of a general character which does not have a general application.

* * * * * *

Therefore, with reference to this branch of the subject I may summarize the situation by the statement that section 7 makes so far as the antitrust laws are concerned all labor and agricultural associations lawful and endows them with power, if they did not have it before, of carrying out in a lawful manner the legitimate purposes and objects of their organizations, but they may nevertheless so act as to violate the law just as corporations or individuals may violate it by conduct which brings them within its prohibitions.

Senator Hughes and Senator Jones also spoke to the same effect and Senator Thompson, one of the foremost labor advocates in the Senate, replied to a question of Senator Jones as follows during the course of his speech:

Mr. Jones. I desire to get the views of the Senator from Kansas as to how far he thinks this provision of the proposed law goes. Does it go any further than recognizing the legality of these organizations, or does it permit these organizations, after they are organized, to then go on and do things in restraint of trade and exempt them from prosecution for such acts?

Mr. Thompson. I think it exempts them simply as lawful organizations; but, of course, if they do anything unlawful or use any unlawful means, they are subject to prosecution under the antitrust law and under the general laws on the subject without regard to the antitrust law.

On September 2, 1914, section 7 of the bill was amended inserting at the beginning of the section the following rds, "That the labor of a human being is not a comlity or article of commerce."

This amendment was passed in response to the deads of labor organizations who apparently believed that amendment would cause laws enacted under the comce clause to be inapplicable to labor. No Senator seemed ave any ideas, clear or otherwise, as to what effect this vision would have, if any, or what it meant.

On the same day, September 2, 1914, the bill as ended was passed by the Senate. The significant amendts have been pointed out above.

On September 4, 1914, the bill was returned to the ate from the House without agreement upon the proed Senate amendments and with a proposal for a conence, to which proposal the Senate agreed. It should be ed, however, that the House expressed no dissatisfac with sections 7 or 18 (19) as amended and passed by Senate.

In the conference the section which had been designated as "7" was changed to "6" and the section which had been designated as "18" was changed to "20." The Conference Committee did not change the substance of either section in any material degree.*

Upon the return of the bill to the Senate from the Conference Committee, several extended speeches were made with reference to the labor provisions. The tenor of these speeches indicates that the prevailing opinion was to the effect that sections 6 and 20 would not serve to exempt labor organizations from the provisions of the Sherman Act. Several senators ventured the opinion that section 20 would legalize the secondary boycott but the prevailing view seemed to be to the contrary. A number of senators expressed the view that sections 7 and 20 would not serve to alter the existing law in any manner or degree.

The same view was expressed in the House discussion of the Conference bill. With reference to section 6, Representative Webb, who had been a House member of the Conference Committee, said:

> Mr. Speaker, in our old section 7, section 6 of the conference report, known as the labor section, the Senate inserted these words:
>
> "The labor of a human being is not a commodity or article of commerce."
>
> Of course that is a mere legislative declaration or postulate. I do not think it does any harm. I do not know that it does any good. Your conferees agreed to let it remain.

---

* See comparative print showing H. R. 15657 as Passed by the House, as Passed by the Senate and as Agreed to in Conference, Doc. 584, 63d Cong., 2d sess.

In answer to a question from Representative Stafford with reference to the object of the addition of the word "lawfully," Mr. Webb said:

> I do not know what moved the Senate to put that word in. We had no objection to it, and hence accepted the amendment.

Very little else was said in either the House or the Senate with reference to the addition to section 6 of the clause, "The labor of a human being is not a commodity or article of commerce." The general opinion with reference to this amendment was tersely stated in one sentence by Representative Volstead, shortly before the bill was finally passed in the House. Mr. Volstead said: "As it reads it is hard to tell what it means."

The bill passed both the House and the Senate without further amendment.

A person seeking to discover what the Congress which enacted the Clayton Act intended does not encounter the difficulties occurring in the search for the legislative history of the Sherman Act. There are no missing links in the legislative process. All the usual sources of information as to legislative intention are available.

The committee reports and the statements of the members of the committees, including the Conference Committee, are all in accord that the Clayton Act was *not* designed totally to exempt labor from the antitrust laws. These statements show that Congress intended to safeguard the existence of labor organizations against possible dissolution, and also to protect those types of conduct which most, but not all, courts already regarded as legal. Although there was some diversity of opinion in the debates on the

floor most of the speakers in both the Senate and House took the same view.

In view of the fact that the secondary sources of legislative intention indicate that it was not intended completely to exempt labor from the antitrust laws, the only remaining question is whether the language of the statute so clearly compels a different conclusion that the legislative history cannot be used.

Section 20 does not purport to make all the activities of labor unions lawful under the antitrust laws. The controversy with respect to that section has related to whether or not the peaceful secondary boycott is made lawful, a subject which we will consider in connection with *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443. But no matter how liberally the section be construed, the use of force and violence by labor organizations is not protected. Thus, it cannot be said that that section gives labor a complete exemption.

Section 6 contains three clauses. The first, providing that, "The labor of a human being is not a commodity or article of commerce," cannot be said to have any definite, substantive meaning. Even though this statement was hailed by labor as making the Clayton Act "Labor's Magna Charta", it is clear that the members of Congress neither knew what the clause meant nor expected it to be of any great consequence.

Section 6 then provides that—

> Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor • • • organizations, • • • or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof • • •;

This language does not protect the individual members of labor organizations from acting unlawfully or from carrying out illegitimate objects, and accordingly grants labor no general immunity. While it protects the existence of labor organizations, it does not appear otherwise to change the prior law, which of course did not forbid individual members from lawfully carrying out legitimate objects.

The last clause of Section 6, which follows immediately after that just discussed, provides that—

> • • • nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust law.

This clause by itself might be regarded as granting labor complete exemption from the antitrust laws. It certainly is susceptible of such a construction. But it also might be interpreted, since it does not refer to the *acts* of labor organizations or of their members but only to the organizations and members themselves, as merely protecting them against an unlawful status.

This clause cannot be read alone. Section 6 and particularly the last sentence must be taken as a whole. If the last clause be given the more sweeping of the two interpretations, the preceding clause, which protects only the existence of labor organizations and their lawful and legitimate activities, would be rendered entirely unnecessary and meaningless. On the other hand, if the last clause be given the second, more restrictive interpretation, it adds nothing to the preceding clause and in turn becomes meaningless. Thus, although the last clause in itself might be deemed to have a clear meaning, section 6 as a whole is plainly ambiguous. This ambiguity justifies resort to the

legislative history. As has been shown, this indicates that it was the prevailing view of Congress that the last clause of section 6 added nothing to what preceded it, and that it did not absolutely exempt members of labor organizations from the antitrust laws.

Supreme Court Interpretation of the Clayton Act. As we have seen above, it was the apparent intent of Congress in the Clayton Act that nothing in the antitrust laws shall be construed to forbid the existence and operation of labor organizations, but that the Clayton Act did not operate to exempt them or their members from accountability when they departed from legitimate objectives. In *Duplex Co.* v. *Deering*, 254 U. S. 443, complainant sought to enjoin defendant labor union officials, who were seeking to unionize complainant's factory, from further interference with complainant's interstate trade by means of "secondary" boycotts, sympathetic strikes in other trades, and threats to third parties. This was the first case involving the application of the Clayton Act to labor organizations to come before the Supreme Court. Cf. *Paine* v. *Neal*, 244 U. S. 459. In holding that the Clayton Act did not exempt labor organizations or their members from the provisions of the Sherman Act, the Court said (at 469):

> As to §6, [of the Clayton Act] it seems to us its principal importance in this discussion is for what it does *not** authorize, and for the limit it sets to the immunity conferred. The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the anti-trust laws shall be construed to forbid the existence and operation of such organizations or to forbid their members from *lawfully** carrying out their *legitimate** objects; and that

*Italics the Court's.

such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the antitrust laws.

The Court considered the legislative history of the Clayton Act and said (at 472 *et seq.*):

Nor can §20 be regarded as bringing in all members of a labor organization as parties to a "dispute concerning terms or conditions of employment" which proximately affects only a few of them, with the result of conferring upon any and all members,—no matter how many thousands there may be, nor how remote from the actual conflict—those exemptions which Congress in terms conferred only upon parties to the dispute. That would enlarge by construction the provisions of §20, which contain no mention of labor organizations, so as to produce an inconsistency with §6, which deals specifically with the subject and must be deemed to express the measure and limit of the immunity intended by Congress to be incident to mere membership in such an organization. At the same time it would virtually repeal by implication the prohibition of the Sherman Act, so far as labor organizations are concerned, notwithstanding repeals by implication are not favored; and in effect, as was noted in *Loewe* v. *Lawlor*, 208 U. S. 274, 303-304, would confer upon voluntary associations of individuals formed within the States a control over commerce among the

States that is denied to the governments of the States themselves.

The qualifying effect of the words descriptive of the nature of the dispute and the parties concerned is further borne out by the phrases defining the conduct that is not to be subjected to injunction or treated as a violation of the laws of the United States, that is to say: (a) "terminating any relation of employment, * * * or persuading others by peaceful and lawful means so to do"; (b) "attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working;" (c) "ceasing to patronize or to employ any party to such dispute, or * * * recommending, advising, or persuading others by peaceful and lawful means so to do"; (d) "paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits * * *"; (e) "doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto." The emphasis placed on the words "lawful" and "lawfully," "peaceful" and "peacefully," and the references to the dispute and the parties to it, strongly rebut a legislative intent to confer a general immunity for conduct violative of the anti-trust laws, or otherwise unlawful. The subject of the boycott is dealt with specifically in the "ceasing to patronize" provision, and by the clear force of the language employed the exemption is limited to pressure exerted upon a "party to such dispute" by means of "peaceful and *lawful**" influence upon neutrals. There is nothing here to justify defendants or the organizations they represent in using either threats or persuasion to bring about strikes or a cessation of work on the part of employees of complainant's customers or pro-

*Italics the Court's.

spective customers, or of the trucking company employed by the customers, with the object of compelling such customers to withdraw or refrain from commercial relations with complainant, and of thereby constraining complainant to yield the matter in dispute. To instigate a sympathetic strike in aid of a secondary boycott cannot be deemed "peaceful and lawful" persuasion. In essence it is a threat to inflict damage upon the immediate employer, between whom and his employees no dispute exists, in order to bring him against his will into a concerted plan to inflict damage upon another employer who is in dispute with his employees.

The majority of the Circuit Court of Appeals, very properly treating the case as involving a secondary boycott, based the decision upon the view that it was the purpose of §20 to legalize the secondary boycott "at least in so far as it rests on, or consists of, refusing to work for any one who deals with the principal offender." Characterizing the section as "blindly drawn," and conceding that the meaning attributed to it was broad, the court referred to the legislative history of the enactment as a warrant for the construction adopted. Let us consider this.

By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body. *Aldridge* v. *Williams*, 3 How. 9, 24; *United States*. v. *Union Pacific R. R. Co.*, 91 U. S. 72, 79; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 318. But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the mean-

ing of a statute is obscure. *Binns* v. *United States*, 194 U. S. 486, 495. And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage. *Binns* v. *United States, supra; Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 198-199; *United States* v. *Coca Cola Co.*, 241 U. S. 265, 281; *United States* v. *St. Paul, Minneapolis & Manitoba Ry. Co.*, 247 U. S. 310, 318.

In the case of the Clayton Act, the printed committee reports are not explicit with respect to the meaning of the "ceasing to patronize" clause of what is now §20. (See House Rept. No. 627, 63d Cong., 2nd sess., pp. 33-36; Senate Rept. No. 698, 63d Cong., 2nd sess., pp. 29-31; the latter being a reproduction of the former.) But they contain extracts from judicial opinions and a then recent text-book sustaining the "primary boycott," and expressing an adverse view as to the secondary or coercive boycott; and, on the whole, are far from manifesting a purpose to relax the prohibition against restraints of trade in favor of the secondary boycott.

Moreover, the report was supplemented in this regard by the spokesman of the House committee (Mr. Webb) who had the bill in charge when it was under consideration by the House. The question whether the bill legalized the secondary boycott having been raised, it was emphatically and unequivocally answered by him in the negative.[1] The subject—he

---

[1] Extracts from Congressional Record, vol. 51, Part 10, 63d Cong., 2d sess.

(Page 9652.)

Mr. Volstead. Would not this also legalize the secondary boycott? • • •

Mr. Webb. Mr. Chairman, I do not think it legalizes a secondary boycott.

declared in substance or effect—was under consideration when the bill was framed, and the section as reported was carefully prepared with the settled purpose of excluding the secondary boycott and confining boycotting to the parties to the dispute, allowing parties to cease to patronize and to ask others to cease to

---

Mr. Volstead. Let me read the lines, if the gentleman will permit. And no such restraining order or injunction shall prohibit anyone——

"from ceasing to patronize **those who** [or to] employ any party to such dispute, or from recommending, advising, or persuading others by peaceful means so to do."

Now, does not the word "others" in that instance refer to others than parties to the dispute?

Mr. Webb. No; because it says in line 15:

"From ceasing to patronize or employ any parties to such dispute."

Mr. Volstead. * * * Can there be any doubt this is intended or does, in fact, legalize the secondary boycott?

Mr. Webb. I will say frankly to my friend when this section was drawn it was drawn with the careful purpose not to legalize the secondary boycott, and we do not think it does. There may be a difference of opinion about it, but it is the opinion of the committee that it does not legalize the secondary boycott and is not intended to do so. It does legalize the primary boycott; it does legalize the strike; it does legalize persuading others to strike, to quit work, and the other acts mentioned in section 18 [now section 20], but we did not intend, I will say frankly, to legalize the secondary boycott.

(Page 9653.)

Mr. Webb. I will say this section was drawn two years or more ago and it was drawn carefully, and those who drew this section drew it with the idea of excluding the secondary boycott. It passed the House, I think, by about 243 to 16, and the question of the secondary boycott was not raised then, because we understood so clearly it did not refer to or authorize the secondary boycott.

patronize a party to the dispute; it was the opinion of the committee that it did not legalize the secondary boycott, it was not their purpose to authorize such a boycott, not a member of the committee would vote to do so; clarifying amendment was unnecessary; the section as reported expressed the real purpose so well that it could not be tortured into a meaning authorizing the secondary boycott. This was the final word of the House committee on the subject, and was uttered under such circumstances and with such impressive emphasis that it is not going too far to say that except for this exposition of the meaning of the section it would not have been enacted in the form in which it was reported. In substantially that form it became law; and since in our opinion its proper construction is entirely in accord with its purpose as thus declared, little need be added.

These views as to the scope of the Clayton Act were again specifically applied by the Supreme Court in *Bed-*

(Page 9658.)

Mr. Webb. Mr. Chairman, I should vote for the amendment offered by the gentleman from Minnesota [Mr. Volstead] if I were not perfectly satisfied that it is taken care of in this section. The language the gentleman reads does not authorize the secondary boycott, and he could not torture it into any such meaning. While it does authorize persons to cease to patronize the party to the dispute and to recommend to others to cease to patronize that same party to the dispute, that is not a secondary boycott, and you can not possibly make it mean a secondary boycott. Therefore this section does not authorize the secondary boycott.

I say again—and I speak for, I believe, practically every member of the Judiciary Committee—that if this section did legalize the secondary boycott there would not be a man vote for it. It is not the purpose of the committee to authorize it, and I do not think any person in this House wants to do it. We confine the boycotting to the parties to the dispute, allowing parties to cease to patronize that party and to ask others to cease to patronize the party to the dispute.

ford Cut Stone Co. v. *Stone Cutters' Assn.*, 274 U.S. 37. These views were likewise applied by the unanimous Supreme Court in *United States* v. *Brims*, 272 U.S. 549, and *Local 167* v. *United States*, 291 U.S. 293. Despite a square challenge of these cases in the Supreme Court by the general counsel for the A.F.of L. in *United States* v. *The Borden Co.*, *supra*, the Supreme Court held that in view of the jurisdictional limitations upon the successful appeal by the Government in that case, that question was not open to argument before it, saying:

> Similarly, the contention of the defendants who are labor officials that the Sherman Act does not apply to labor unions or labor union activities is not open on this appeal. The District Court did not construe the Sherman Act as inapplicable to these defendants and the Government's appeal, under the restriction of the Criminal Appeals Act, does not present that question.

Mr. Justice Frankfurter (*op. cit. supra*) has summed up the results of these debates as follows, and indicated his view that the Clayton Act did not change the interpretation theretofore given to the Sherman Act by the Supreme Court, as follows:

> As originally introduced in the House, the bill for the correction of abuses in issuing labor injunctions carried no exemption of labor organizations from the scope of the antitrust laws. Upon the plea of Samuel Gompers, speaking for organized labor, a provision to this end was reported by the House committee and passed by the House. In the course of the Senate debate upon the bill, an amendment was proposed and adopted in the form of the famous sentence, "The labor of a human being is not a commodity or article of commerce." By President Wilson's signature, these pro-

visions, as Section 6 of the Clayton Act, became law on October 14, 1914. The exact text of this section is important:

> "Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

This measure brought labor, so it was thought, into the promised land. "Those words, the labor of a human being is not a commodity or article of commerce", Samuel Gompers informed the trade union movement, "are sledge hammer blows to the wrongs and injustices so long inflicted upon the workers. This declaration is the industrial magna charta upon which the working people will rear their construction of industrial freedom." And descending to particulars, Mr. Gompers added, "This declaration removes all possibility of interpreting trust legislation to apply to organizations of the workers, and their legitimate associated activities." Whether this expectation coincided with Congressional intent is meat for endless dialectic. The debates in Congress looked both ways. When the bill was first reported out of the House Judiciary Committee, one of its members, referring specifically to the clause—"Nor shall such organizations • • • be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws,"—said that this "would clearly exempt labor organizations • • •

from the provisions of the anti-trust laws;" that it "would give these organizations what they have desired so long, and all they have been struggling for since the original enactment of the Sherman anti-trust law." Another member of the same committee told the House "We are taking them (labor organizations) out from the ban of the present law to the extent that in future they cannot be dissolved as unlawful combinations. Their existence is made lawful and they are given a legal status." These expressions may serve as a cross section of Congressional opinion. Did the section merely legalize what was already legal, *i. e.*, the mere existence of labor unions, or did it completely immunize labor organizations from prosecution or suit under the Sherman Law? The majority report of the House Committee adopted the innocuous view of the measure. A minority of the same committee suggested that the act would merely prevent suits for the dissolution of labor organizations, but would continue to permit the issue of injunctions under the Sherman Law to restrain them from carrying out their purpose. No less equivocal is the evidence furnished by the debate in the Senate. Senator Pittman was confident that as a result of the new measure the anti-trust laws have "nothing to do with organized labor * * * that any unlawful acts committed in the pursuit of the objects of their organizations shall be tried and determined by other existing laws." To which Senator Cummins replied that "in my view he (Senator Pittman) has stated just what Section 7 (Section 6 of this bill as passed) does not do." A rather large group of Congressmen attacked the legislation as futile if it aimed only at legalization of what was already legal, and vicious if it accomplished the immunization of labor from the anti-trust laws.

This brief history illustrates how fictitious can become the search by courts for the "intent of the legis-

lature" in construing ambiguous enactments. With a legislative history like that which surrounds the Clayton Act, talk about the legislative intent as a means of construing legislation is simply repeating an empty formula. The Supreme Court had to find meaning where Congress had done its best to conceal meaning. In June, 1917, in denying, for the majority of the Court *equitable* relief in a labor case [1] on the two grounds that the Sherman Law only authorized the government and not private suitors to obtain injunctions, and that the Clayton Act, which did grant such authority, came too late to apply to this case, Mr. Justice Holmes expressed the view that even if the Clayton Act were applicable it "establishes a policy inconsistent with the granting of one (an injunction) here." But Mr. Justice Holmes added prophetically, "I do not go into the reasoning that satisfies me, because upon this point I am in the minority." Before very long another case compelled decision on the issue, and the majority of the Court concluded that "there is nothing in the section (6) to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade." [2] The long-drawn-out battle on the national stage, to withdraw labor tactics from the risks of judicial notions concerning "restraint of trade", was fought and lost. (pp. 142-146)

There is one additional consideration which is entitled to great weight in any consideration of legislative intent respecting the Clayton Act. The decision in *Duplex Co.* v. *Deering, supra*, was handed down in 1921 and has been consistently followed since by the Supreme Court. See cases cited *supra*. This interpretation of the statute was the sub-

[1] **Paine Lumber Co. v. Neal**, 244 U.S. 459 (1917).
[2] **Duplex Co. v. Deering**, 254 U.S. 443, 469 (1921).

ject of prolonged public discussion. Despite these circumstances no action has at any time been taken by Congress to amend the statutes so as to provide for an express exemption of the kind defendants argue for. It cannot be said that throughout this period Congress has been indifferent to the welfare of labor or to the interests of labor organizations. It has enacted legislation designed to prevent the abuse of the injunctive process in labor disputes;[1] legislation designed to protect and preserve the right of labor to bargain collectively and the right of labor organizations to be free from employer interference;[2] legislation designed to protect the wages and hours of labor;[3] and legislation designed to provide protection for workers against the hazard of unemployment and of old age.[4]

---

[1] Norris-LaGuardia Act of March 23, 1932, c. 90, 47 Stat. 70, U.S.C., Title 29, Sections 101-115.

[2] Wagner Labor Relations Act of July 5, 1935, c. 372, 49 Stat. 449, U.S.C., Title 29, Sections 151 **et seq.**

[3] Fair Labor Standards Act of June 25, 1938, c. 676, 52 Stat. 1060, U.S.C., Title 29, Sections 201-219.

[4] Social Security Act of August 14, 1935, c. 51, 49 Stat. 620, U.S.C., Title 42, Sections 301 **et seq.**